IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

C.R. No. 2492 of 1986

Date of Decision: 5.9.2006

M/s Victor Industries and others.

…Petitioners

Versus

Banarasi Lal

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

Present : Mr. J.R. Mittal, Senior Advocate with
Mr. Rajiv Mittal, Advocate,
for the petitioners.

Mr. M.L. Sarin, Senior Advocate with
Mr. Hemant Sarin, Advocate,
for the respondent.

JUDGMENT

M.M. KUMAR, J.

This petition filed by the tenant-petitioner, namely, M/s Victor Industries and others, under Section 15(v) of the East Punjab Urban Rent Restriction Act, 1949 (for brevity, 'the Act'), challenges

the view taken by both the Courts below directing its ejectment broadly on two grounds. Firstly, it has been held that the tenant-petitioner has violated the terms of the rent deed, dated 01.05.1978, inasmuch as, Smt. Kailash Wati has been inducted as a tenant by virtue of partnership deed executed on 6.5.1978. It has further been found that there are material alternations effected in the building by the tenant-petitioner without express permission of the landlord-respondent.

The learned Appellate Authority firstly, decided the issue of constitution of the tenant-petitioner firm, namely, M/s Victor Industries as on 1.5.1978. The aforementioned controversy was to be decided in view of the conflicting claim of both the parties. According to the landlord-respondent, the demised premises was taken on rent on 1.5.1978 and the rent deed was executed on 6.5.1978, whereas the stand of the tenant-petitioner is that the demised premises was taken on 6.5.1978 and on that day M/s Victor Industries was a partnership firm comprising of Hari Chand, Kailash Wati and her son Rakesh Kumar. The Appellate Authority concluded that the constituents of M/s Victor Industries was Hari Chand and Rakesh Kumar son of Krishan Kumar as on 1.5.1978 and they had inducted Smt. Kailash Wati as partner, which was unequivocally in violation of the terms and conditions of the tenancy. It would be necessary to refer to long para 7 of the judgment of the Appellate Authority, which closely scrutinises evidence and findings and the same reads as under:-

"In order to adjudicate as to whether M/s Victor

Industries sublet the premises to Shrimati Kailash Wati and her son Rakesh Kumar or not, I will have to decide at the first instance the constitution of M/s Victor Industries as on 1.5.1978 because according to the landlord the premises were taken on rent on 1.5.1978 and the rent note was executed on 6.5.1978. The stand of the respondents, on the contrary is, that the premises were taken on rent on 6.5.1978 and on that day M/s Victor Industries, a partnership firm, which constituted Hari Chand, Kailash Wati and her son Rakesh Kumar respondent no.3. According to the rent note Ex.A.1 which was executed by M/s Victor Industries, it has been stated that M/s Victor Industires through Shri Hari Chand son of Shri Raj Ram and Rakesh Kumar son of Hari Chand son of Raja Ram resident of Ludhiana are the partners of the said M/s Victor Industries and M/s Victories through these partners have taken the premises on rent, i.e. one hall room, and two rooms adjoining with each other at the monthly rent of Rs.500/- with effect from 1.5.1978 to 31.7.1978. It was also stipulated in the rent that the tenant will not co-opt any other partner in the partnership firm. This rent note was executed on 6.5.1978 and has been proved by the statements of two witnesses, Shri Mukandi Lal aW1, petiton-writer and Shri Haqiqat Rai AW2 who is the marginal witness of the rent note. Two aspects now arises from this note, firstly, whether Victor Industries was a partnership firm consisting of Hari Chand and his son Rakesh Kumar or not? and secondly whether M/s Victor Industries was a partnership firm consisted of Hari Chand and Rakesh Kumar son of Kewal Krishan. It is the case of the appellants themselves that Shri Hari Chand had no son by the name of Rakesh Kumar and this part of the case of the appellants appears to be correct because even from the statement of Banarsi Lal landlord it becomes clear that there was no person by the name of Rakesh Kumar son of Hari Chand. In this regard I would like to refer to the statement of Shri Banarsi Lal himself. He has stated that he has not seen Rakesh Kumar. He had no talk with Rakesh Kumar son of Hari Chand. He did not see Rakesh Kumar son of Hari Chand working in the defenant-firm. However, he had been seeing Rakesh Kumar son of Kewal Krishan respondent no.3 working in the defendant firm. He cannot deny the suggestion that Hari Chand has no son by the name of Rakesh Kumar. RW3 Shri Hari Chand has stated that he has no son by the name of Rakesh Kumar and Rakesh Kumar has also appeared in the witness box and stated that he is the son of Shri Kewal Krishan. In view of this, it is clear that there was no person by the name of Rakesh

Kumar son of Hari Chand and the recital in the rent note Ex.A.1 to the effect that Victor Industries had a partner by the name of Rakesh Kumar son of Hari Chand was erroneous and infact M/s Victor Industries had a partner by the name of Rakesh Kumar son of Kewal Krishan when the premises were taken on rent with effect from 1.5.1978 and when the rent note Ex.A.1 was executed on 6.5.1978. If this is proved that the constituents of M/s Victor Industries were Hari Chand and Rakesh Kumar son of Kewal Krishan as on 1.5.1978 to 6.5.1978, what would be the effect of these partners had inducted Smt.Kailash Wati as partner against the terms of the tenancy. The entire case of the appellants Victor Industries is that infact the premises were taken on rent on 6.5.1978 and not on 1.5.1978. For the sake of convenience it has been incorporated in the rent note that the tenancy would start from 1.5.1978 but infact the tenancy started from 6.5.1978 an the partnership deed Ex.PW4/A of M/s Victor Industries got produced by the respondent also shows that M/s Victor Industries was a partership firm consisting of Hari Chand, Kailash Wati and Rakesh Kumar son of Kewal Krishan but the tenancy of the demised premises started from 6.5.1978 it means tht all the three partners of M/s Victor Industries and their firm M/s Victor Industries conduct in its business. In support of his contention, the counsel has drawn my attention to the statement of Shri Banarsi Lal landlord himself where he deposed that M/s Victor Industries is still doing the business in the premises in dispute and that Shri Hari chand is one of the partner and still doing his business. He had a talk regarding the tenancy only on the day rent note was executed and he has given the possession of the factory on the same day i.e. 6.5.1978 to the defendant.

The contention of Shri Parveen Garg may look alluring at the first instance but if we have a close scrutiny to the statement of Shri Banarsi Lal which statement of Shri Banarsi Lal has to be read in conjunctive with the documentary evidence and the statements of Shri Hari Chand and Shri Rakesh Kumar in this regard, one would come to different condition. There is no allegation in the petiton under Section 13 of the Act in which it was the specifically stated that the tenancy accompanied by the delivery on the possession and this part of the allegation of the landlord has not been specifically denied by the tenant. It has not been stated in the written statement that infact the tenancy started from 6.5.1978. Shri Hari Chand the signatory of the rent note appeared in the witness box as RW3 and he

> *admitted in the cross examination by saying that the rent note was written on 6.5.1978 and that the tenancy started from 1.5.1978. He does not remember if he took the possession of the premises on 1.5.1978 or not. Rakesh Kumar RW7 also stated that Hari Chand had taken up the possession of the premises on 1.5.1978. The statement of Shri Banarsi Lal infact is against the terms or the rent note and cannot be given preference as desired by Shri Parveen Garg. However, the two statements of the partners of M/s Victor Industries i.e. namely Shri Hari Chand and Shri Rakesh Kumar read in the light of the terms of the rent note Ex.A.1 leaves no manner of doubt that the possession of the demised premises was given to M/s Victor Industries on 1.5.1978 and that the contention of Mr.Garg that the tenancy started from 6.5.1978 does not appeal to me."*

The learned Appellate Authority then went on to consider the effect of violation of stipulation in the rent deed prohibiting that the partners of M/s Victor Industries were not to induct any other partner in the partnership. Referring to the partnership deed dated 8.5.1978 (Ex. PW-4/1), that the business has been started by the signatories of the deed w.e.f. 6.5.1978. Smt. Kailash Wati, the inducted partner is shown to have share in the profit and loss to the extent of 45 per cent. Rakesh Kumar had also interest upto 50 per cent while Hari Chand had interest only upto 5 per cent. The partnership deed has been duly placed on record which shows that M/s Victor Industries had inducted Smt. Kailash Wati as a partner in violation of the terms and conditions of tenancy. The Appellate Authority further held that Hari Chand and Rakesh Kumar could not have inducted Smt. Kailash Wati as a partner. The induction of another partner had resulted in violation of the terms of the tenancy which clothe the landlord-respondent with right to seek

eviction.

There was some controversy before the Courts below regarding nature of document dated 6.5.1978 (Exhibit A-1). In para 10 of the judgment, the Appellate Authority held that the tenancy had started from 1.5.1978 and after that it has to be concluded that Hari Chand has to be regarded as sole proprietor of the firm. It is on that premise that the Appellate Authority concluded that Hari Chand parted with the possession in favour of Rakesh Kumar son of Kewal Krishan and his mother.

The Appellate Authority has also opined on the question as to whether the so called partnership of Hari chand, Rakesh Kumar and his mother Kailash Wati was a camouflage. It has been concluded that Hari Chand had practically ceased to be a partner of the firm who had started his own business in the name of Nav Bhart Radio, Bazar Kharadian, Ludhiana. The aforementioned findings have been recorded in paras 12 and 15 of the judgment and the same reads as under:-

> *" 12. The learned counsel for appellants then submitted that it had been admitted by Shri Banarsi Lal himself that Shri Hari Chand is still doing the business in the premises and simply that the interest of Shri Hari Chand is less in the partnership business is no ground to hold that Shri Hari Chand has parted with the possession of the demised premises.*
>
> *On the contrary, Shri Wadhera contended that so called partnership business of Hari Chand with Rakesh Kuamr and his mother Smt.Kailash Wati is a camouflage. In fact Shri Hari Chand has parted with the possession of the demised premises to Rakesh Kumar son of Kewal Krishan and Smt.Kailash Wati.*
>
> *This contention of the learned counsel for the appellants does not appear to be sound because I have*

to see the real intention of the parties as to whether Shri Hari Chand is a partner or that a camouflage has been raised so as t save the premises from eviction. It has been admitted by Shri Hari Chand RW3 that he did not invest any amount when he became the partner of the firm. He was also doing his business in the name of Nav Bharat Radio, Bazar Kharadian, Ludhiana. He cannot give the details of the investment made by Kailash wati and Rakesh Kumar. He cannot tell the account number of the Bank. He cannot give the details of the deposits of the account of the Pass books. He cannot tell the names of the workers employed in his premises of M/s Victor Industries. He might have been earning profits ranging Rs.1000/- to Rs.1500/- during the years 1978-79, 1979-80 and 1980-81. He admits that he has only 5 per cent share in the profits and loss of this firm. Rakesh Kumar RW3 stated that he cannot tell about the amount given by Hari Chand at the time of the start of the business. He cannot tell the amount even by approximation. He does not know if he had deposited Rs.100/- or Rs.5000/. He does not know if Hari Chand had been carrying on business in sewing machines. It was admitted by Shri Rakesh Kumar that Hari Chand generally deal in the business of spare parts of the cycles before he became a partner of Victor Industries. He does not remember orally how much profit was earned by Hari Chand and Rakesh Kumar indicate that Shri Hari Chand has practically ceased to be a partner of M/s Victor Industries and infact he has started his own business in the name of Nav Bharat Radio.

xxx xxx xxx xxx xxx
xxx xxx xxx xxx

15. Hari Chand has practically no interest. Only it has been shown that he enjoys interest upto 5 per cent. In view of the shaky evidence given by Hari Chand and Rakesh Kumar it can be safely inferred that Shri Hari Chand has walked out from the business of M/s Victor Industries.

The counsel for the appellants then relied on 1985 Vol.I R.C.R.376 and contended that in order to constitute a subletting mere, user by another person does not amount to parting with the possession. Vesting of possession by a tenant in another person is necessary. This authority is not helpful to the appellants at all. The counsel then relied on 1985 Vol.I. Rent Law Report 662, M/s Ram Dhan Des Ramji Das Sethi Vs. Shri Dash Bandu and another, and contended that the onus lies on

the landlord to prove that the alleged sub-tenant was in exclusive possession of the demised premises."

The Appellate Authority then considered the material impairment and alternation effected in the demised premises. It has firstly, been found that rent deed (Exhibit R-1) clearly indicate that one hall measuring 60' x 20' besides two rooms were let out to the tenant-petitioner, which has been converted into two halls. Referring to the question as to whether dividing into two halls by raising a wall would amount to material alternation, the learned Appellate Authority has concluded in para 18 of the judgment that it would be treated as material alteration and consequently has ordered ejectment by holding as under:-

"The counsel for the appellants in the alternative argued that even it is held that a tenant has raised the wall and converted one hall into two halls it does amount the material alteration and in support of his contention, the counsel relied upon 1985 Vol. I R.L.R. 663, Ram Dhan Vs. Desh Sandu (Supra) but this authority is not distinguishable on facts because in the cited case wall was raised only upto a distance of 7/8 feet on the ground level but in the present ase, it has been proved that the intervening wall is upto the roof level. Firstly, there is a statement of the Expert Shri Both Raj Dhall and soncondly there is a admission of Shri Rakesh Kumar RW7 when he stated that the intervening wall is complete upto roof and there is a door in it. The change of user has to be seen form the landlord's point of view and it cannot be permitted to a tenant to make material alteration in the property. Banarsi Lal has categorically stated that he came to know about the construction only 2/3 years back i.e. some where 1981-82. It is difficult to remember on the part of a landlord to know when the tenant started alteration because it is not one's day matter. The statement of Shri Satya Dev Gupta RW4 cannot be accepted in view of the alterations made by the tenant. The tenant himself admits that the premises has now consists of two halls instead of one, as let out to M/s Victor Industries. Hence I again affirm the findings of the Rent Controller on issue no.3"

Mr. J.R. Mittal, learned counsel for the tenant-petitioner has argued that violation of the conditions laid down in the rent deed would not necessarily constitute a ground for ejectment until and unless such a violation is covered by Section 13 of the Act. According to the learned counsel the ground of sub-letting has not been proved nor there is any finding recorded by either of the two Courts. He has mentioned that Shri Hari Chand, who was originally tenant along with another person has continued to be tenant although his share might have diminished to the extent of 5%. He has pointed out that Shri Banarsi Lal, landlord-respondent in his statement has admitted that Shri Hari Chand continues to be a partner in the firm M/s Victor Industries and that M/s Victor Industries has never been a proprietor concern but a partnership firm. Attacking the finding on the issue of the identity of Shri Rakesh Kumar, the other partner mentioned in the partnership deed (Ex. PW4/A) learned counsel has argued that merely because the name of one partner has been erroneously mentioned would not lead to the conclusion that the firm has acquired the character of a proprietorship firm instead of partnership firm. He has also challenged the view taken by the Appellate Authority in brushing aside the admission made by the landlord-respondent on the rationale that it stand explained, whereas, in fact, it has not been explained.

He has further submitted that on record there was a previous application dated 6.3.1981 (Ex. R-12), which was filed by the landlord-respondent. In the aforementioned application the

landlord has sought ejectment of the tenant-petitioner by pleading sub-letting of the building as it exist today whereas in the application filed subsequently on 19.1.1982, from which the instant petition has arisen, entirely different facts have been mentioned. A site plan (Ex. R-1) filed with the previous application is entirely different than the one projected in the present proceedings, as the earlier application is stated to be withdrawn. Counsel for the landlord-respondent had made a statement for withdrawal of the earlier petition as is evident from Ex. R-13, wherein Shri Banarsi Lal, landlord-respondent has stated that he did not wish to prosecute the said application and the same be filed. The aforementioned statement was made on 18.9.1981. According to the learned counsel, under Order VII Rule 1 (j) (as amended by Punjab and Haryana High Court) of the Code of Civil Procedure, 1908, it is a mandatory duty of the landlord to mention the earlier litigation and the result thereof. In support of his submission learned counsel has placed reliance on a judgment of Delhi High Court in the case of the **Holy Health and Education Society v. Delhi Development Authority, 1999 (3) PLR 60**. Learned counsel has also pointed out that after withdrawal of the earlier application the landlord-respondent has been accepting rent and has acquiescence with the alternation whatever alleged to have been made. A plea of estoppel and res judicata would arise. Learned counsel has further submitted that the rent deed (Ex. A.1) is also inadmissible in evidence as it required registration under Section 107 of the Registration Act, 1908. The rent deed in the present case has

been signed by both the parties whereas the pure and simple rent deed is signed only by the tenant. If rent deed is not taken into consideration then the landlord-respondent has no case. Learned counsel has also referred to Section 14 of the Rent Act and has argued that public policy require that no person should be waxed twice on the same cause of action. He has referred to the provision of Order XXIII Rule 1 and Order II Rule 2 of the Civil Procedure Code. In support of his submission, learned counsel has placed reliance on judgments of this Court in case of **Ram Partap v. Indian Electric Works Ltd., 1965 Suppl. PLR 225 (para 7 & 8)** and Full Bench Judgment in the case of **Teja Singh v. U.T. Administration, Chandigarh, AIR 1982 P&H 169**. Learned counsel has mentioned that once the application filed by a landlord is not bonafide then the application is liable to be dismissed on that ground alone as has been held in para 4 of the judgment of this Court in the case of **Mehar Chand and another v. Tilak Raj Girdhar, AIR 1982 P&H 144.**

Mr. Mittal, learned senior counsel has further stressed that the failure to address argument on the issue of res judicata, as recorded by the Rent Controller would not amount to giving up the plea. Learned counsel has referred to para 11 of the judgment of Rent Controller, discussing issue Nos. 4 and 5 to submit that an issue on which no arguments have been addressed would not amount to giving up that issue. He has placed reliance on a Division Bench judgment of this Court in the case of **Union of India & Ors. v. Diwan Chand, 1978 Revenue Law Reporter 496**. He has further submitted that in

any case if any concession, on the point of law has been made, then it would not amount to estoppel as has been held in para 10 of the judgment of Hon'ble the Supreme Court in the case of **The Govt. of Tamil Nadu and others v. Badrinath and others, AIR 1987 SC 2381**.

Mr. M.L. Sarin, learned senior counsel appearing for the landlord-respondent has argued that principles of res judicata could not be applied to the case in hand because the basic requirements envisaged by law have not been fulfilled. According to the learned counsel, copies of the pleadings, issues and judgment in the previous case were required to be tendered in evidence, which has not been done in the present case. For the aforementioned proposition, learned counsel has placed reliance on para 13 of the judgment of Hon'ble the Supreme Court in the case of **V. Rajeshwari (Smt.) v. T.C. Saravanabava, (2004) 1 SCC 551,** and para 9 of the judgment of this Court in the case of **Salwant Singh and others v. Surinder Singh and others, 1997(1) PLR 160**. According to the learned counsel there are categorical findings by both the Courts below that Hari Chand has parted with the possession to other and creation of partnership is a mere camouflage to defeat the rights of the landlord-respondent. He has then referred to the view of Division Bench of this Court in the case of **Harbhajan Singh and others v. Faquir Chand, 1993 (1) RCR 16,** and **Rattan Singh v. S. Jagjit Singh Man, 1978 (1) RCR 53,** and argued that the principle of res judicata cannot be applied mechanically until and unless the plea is

substantiated in accordance with the requirement of law. He has then submitted that the plea of res judicata in fact has been waived and no arguments have been addressed in both the Courts below and, therefore, such a plea cannot be permitted to be raised for the first time before the High Court, in a revision petition under Section 15 of the Act. Learned counsel has also submitted that this Court should not, in exercise of revisional jurisdiction, interfer in the concurrent findings of fact. In support of his submission, reliance has been placed on a judgment of this Court in the case of **Harjit Kaur v. M.K. Seth and another, 2005 (1) RCR 303**. He has substantiated his argument by submitting that unless the findings are perverse or without evidence or are based on superficial approach or are wholly unreasonable, the findings recorded by the Courts below cannot be reversed. According to the learned counsel subletting would be deemed to be established once the partnership is shown to be sham and fake. He has placed reliance on a Division Bench judgment of this Court in the case of Harbhajan Singh (supra). He has also cited the judgment of this Court in the case of **Anja Sharma (Mrs) v. Krishan Kumar, 1996 (2) RLR 102**.

In support of his argument that there are material alterations, learned counsel has placed reliance on another judgment of this Court in **Shiv Ram through L.Rs v. Sham Lal and another, 2003 (2) RCR 285**. He has also substantiated the ground of subletting by referring to the judgment of Hon'ble the Supreme Court in **Murli Dhar v. Chuni Lal and others, 1970 RCJ 922** and **Parvinder Singh**

v. Renu Gautam and others, 2004 (4) SCC 794. Learned counsel has emphasized that if the tenant is left with a small minor share in the partnership firm then it can be safely assumed that partnership was a camouflage to avoid ejectment. He has placed reliance on **Nagin Chand v. Smt. Kaushalya Devi and others, 1985 (1) PLR 448** and **Sat Narain Saini v. Smt. Sita Wati alia Renu and another, 1993(2) RCR 59**. He has then submitted that a lease deed for a period not exceeding 11 months though reduced to writing does not require registration and, therefore, the lease deed in the present case cannot be thrown out of evidence on that ground. For the aforementioned submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in **Satish Kumar v. Zarif Ahmed & Ors, JT 1997 (3) SC 457**. He has further submitted that in fact the tenancy has started from 1.5.1978 and the lease deed was merely a memorandum and in any case it would not require registration under Section 17 of the Registration Act, 1908. In support of his submission that there is material impairment of the building by alteration, learned counsel has placed reliance on the judgment of **Gurbachan Singh and others v. Shivalak Rubber Industries and others, 1996(2) PLR 694**. He has then submitted that it is the duty of sub tenant to show that in what capacity they have come in possession of the demised premises. Learned counsel has placed reliance on a judgment of this Court in the case of **Ram Chander v. Smt.Amar Devi, 1980 PLR 607**. In support of his submission that concurrent findings cannot be reversed, learned counsel has cited **Dev Kumar v.**

Swaran Lata, AIR 1996 SC 510.

I have bestowed my thoughtful consideration on the submissions made by the learned counsel for the parties and have reached the conclusion that this petition is liable to be dismissed. There are categorical findings that the constitution of partnership firm is merely a cloak. In that regard reference have already been made to the findings recorded in paras 12 and 15 of the judgment of the Appellate Authority. A perusal of the aforementioned paras would show that Hari Chand who had signed the rent deed and was the tenant, has been doing his business in the name of Nav Bhart Radio, Bazar Kharadian, Ludhiana. His share in the tenant-petitioner firm is only to the extent of 5%. In para 15, there are categorical findings that Hari Chand has in fact walked out of the tenant-petitioner firm. It is also appropriate to mention that in para 7 there are categorical findings that the tenency had commenced w.e.f. 1.5.1978 with Hari Chand son of Raja Ram and Rakesh Kumar son of Hari Chand as the partners and Smt. Kailash Wati was inducted as partner on 6.5.1978. There are categorical findings that the possession of the demised premises was given to the tenant-petitioner firm on 1.5.1978. On the basis of the terms of the rent deed and the partnership deed it has been concluded that there was specific prohibition of inducting any other person as partner, yet, Smt. Kailash Wati was inducted as a partner in flagrant violation of that stipulation. Her share in the profit and loss has been kept at 45% and that of Rakesh Kumar upto 50% while Hari Chand had interest only upto 5%. Rakesh Kumar s/o Hari Chand is a non existent identity. It is in these circumstances that the

Courts below have held that once Hari Chand, the signatory to the rent deed, has inducted other partners by keeping his share only upto 5% then it is a mere camouflage to defeat the rights of the landlord-respondent under the Rent Act so as to avoid its ejectment. On the aforementioned findings, it is evident that the tenant-petitioner firm cannot avoid its ejectment as has been held by Hon'ble the Supreme Court in the case of **Parwinder Singh v. Renu Gautam, (2004) 4 SCC 794**. After noticing the general principle of law that a tenant may float a partnership for the purposes of his business to supplement capital or finance or for purpose of securing assistance from such a person in the business, it has been laid down that so long as the premises remain in occupation of the tenant or in his control, a mere fact of entering into partnership may not constitute a ground for eviction. However, their Lordships' has further laid down in Parvinder Singh's case (supra) that where the tenant part with the possession in defiance with the terms of lease then the consequence of eviction must follow and proceeded to observe in paras 8 and 9 as under:-

> *" 8. ……To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. …… However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding*

out the real nature of transaction entered into between the tenant and the alleged sub-tenant.

9. ..... There are cases wherein the tenant sub-lets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by the tenant in favour of a third person. ....."

When the facts of the present case are viewed in the light of the aforementioned statement of law then it becomes evident that the tenant-petitioner cannot escape ejectment as has been held by both the Courts below. In the rent deed it has been specifically stipulated that there were two partners in the firm M/s Victor Industries, namely, Hari Chand son of Raja Ram and Rakesh Kumar son of Hari Chand and through them the firm has taken the premises on rent, which included one hall and two rooms adjoining with each other, at a monthly rent of Rs. 500/- w.e.f. 1.5.1978 to 31.7.1978. There was specific stipulation that the tenant were not to co-opt any other person(s) as partner in the aforementioned partnership firm. The rent deed was executed on 6.5.1978. It has been concluded that, in fact, there was no person with the name of Rakesh Kumar son of Hari Chand son of Raja Ram, which is evident from perusal of para 7 of the impugned judgment. One Rakesh Kumar has appeared in the

witness box to state that he in fact was son of Kewal Krishan and that Hari Chand was the sole proprietor as on 1.5.1978. In this regard, the findings in para 11 of the judgment deserve to be quoted:-

> *"11. Another point which requires adjudication under this issue is, if it is held that M/s. Victor Industries has no partner by the name of Shri Rakesh Kumar son of shri Hari Chand, as on 1.5.78, it would mean that shri Hari Chand was a sole proprietor of M/s Victor Industries and that he parted the possession to Rakesh Kumar son of Kewal Krishan and his mother Smt. Kailash Wati."*

Therefore, there is no escape from the conclusion that Hari Chand, who was the sole proprietor, had inducted Rakesh Kumar son of Kewal Krishan (as against Rakesh Kumar son of Hari Chand son of Raja Ram) and his mother Smt. Kailash Wati as partner. He had parted with possession by reducing his share only to 5 per cent. He had started his business in the name and style of 'Nav Bhart Radio' at Bazar Kharadian, Ludhiana.

The nature of the document Ex. A.1, which is the lease deed, has been found to be a memorandum of the terms of the tenancy and not a lease deed, which may require registration under Section 17 of the Registration Act, 1949.

There are categorical findings on Issue No. 3 that there is material alteration. The tenancy comprised of one hall and two rooms and the finding recorded by the Rent Controller is that the hall has been divided into two parts by constructing an intervening wall therein and fixing a door in that wall, by dividing one big hall into two. The tenant-petitioner has made material alteration without the consent of the landlord-respondent. It stand admitted that the big hall

is divided into 20' x 40' and 20' x 20'. The Appellate Authority have upheld these findings and the argument that there was an ejectment petition filed by the landlord-respondent earlier has been rejected because no such admission was confronted to the landlord-respondent and he was not called upon to explain the same. The aforementioned factual position is evident from the perusal of paras 19 and 20 of the judgment of the Rent Controller and the same reads as under:-

> "19. The respondents, it has been seen evaded to give direct reply to the allegation made by the petitioners. Rent note Ex. I recites that one hall room besides the other portions were rented out to Hari Chand. It is an admitted case now that a well (wall?) was there in the hall whereby the hall stood divided into two portions, one measuring 20' x 40' and the other 20' x 20'. However, the argument of the learned counsel for the contesting respondents was that the halls were two at the time of inception of the tenancy and that the wall was not constructed by them thereafter. He referred to Ex. R12, which is certified copy of ejectment petition which Banarsi Dass, petitioner had filed earlier against the respondents. It has been pointed out that it was the case of the petitioner in that petition that the tenanted premises included two halls measuring 20' x 40' and 20' x 20' besides the other portion. The learned counsel argued that the petitioner cannot wringle (wriggle?) out f this admission and therefore, it has to be held that tenanted premises included two halls and not one.
>
> *20. It is observed that an admission is not exclusive proof of the fact admitted. It can be shown to have been made erroneously or under certain peculiar circumstances. The admission made in Ex. B12 was not put to the petitioner in his statement. Therefore, he was not called upon to explain it. Besides, it is a major recital in rent note Ex. A1 and no oral evidence thereof can be adduced in view of the section 91 of the Evidence Act. Besides, the respondent did not take a specific stand in the written reply. It is not their case as per pleadings that the tenanted premises consisted to two halls and not one. It is also not their case that the case was constructed with the consent of the petitioner. It therefore, has been proved that Hari Chand took one hall, two rooms, etc. from the petitioner and not the hall stood divided into two parts by making an intervening*

> *wall therein and fixed a door in the intervening wall. The change in the premises is to be taken from the point of view of the landlord. According to the petitioner landlord that by dividing the big hall measuring 20' x 40' into two halls measuring 20' x 40' and 20' x 20'. The respondents have brought down the value and utility of the hall. The respondents, therefore, are hold to have materially impaired the value and utility of the demised premises. The issue is thus decided in favour of the petitioner and against the respondents."*

The Appellate Authority while upholding the view of the Rent Controller has observed that material alteration has to be considered from the point of view of the landlord and that there was statement of expert Shri Bodh Raj Dhall and admission made by Shri Rakesh Kumar, RW-7, when he conceded that the intervening wall was complete upto roof level with a door in it. In somewhat similar situation, the question had fallen for consideration of Hon'ble the Supreme Court in the case of **Vipin Kumar v. Roshan Lal Anand, 1993(2) PLR 349,** in the context of Section 13(2)(iii) of the Act. It was held that once the landlord prove the factum of material alteration made by the tenant then the Court could infer its adverse affect on the value and utility of the building keeping in view the nature of alterations. In that case also the tenant had constructed a wall in the verandah and put up a door. It was held by Hon'ble the Supreme Court that such act would amount to impairing the value and utility of the building as it would obstruct the air and light. Section 13(2)(iii) of the Act stipulates that a tenant is liable to be evicted if he has effected alterations which are likely to impair materially the value and utility of the building or rented land. It has further been held that

such alteration has to be seen from the point of view of the landlord. In that regard reliance may be placed on a judgment of this Court in the case of **Satish Kumar & Co. v. Krishan Gopal, 1998 (3) PLR 256**. Therefore, on this ground also, the tenant-petitioner is liable to be evicted.

I am further of the view that once both the Courts below have recorded categorical findings of fact then it would be improper for this Court to reopen the findings and substitute the same by re-appreciating evidence. In that regard reliance may be placed on the judgment of Hon'ble the Supreme Court in the case of **Dev Kumar v. Swaran Lata, (1996) 1 SCC 25**. Similar view has been taken by Hon'ble the Supreme Court in the cases of **D. Radhakrishnan v. M. Loorduswamy, (2001) 10 SCC 641; Gordhanbhai Hathibhai Patel v. Ismailbhai Jaji Ibrahimbhai Malek, (2004) 13 SCC 685; Atma S. Berar v. Mukhtiar Singh, (2003) 2 SCC 3** and **Kailash Chander v. Om Prakash, (2003) 12 SCC 728**.

At this stage it would be appropriate to deal with the contentions raised by Mr. J.R. Mittal, learned senior counsel. His argument that the landlord-respondent had earlier filed an ejectment petition and an order withdrawing the same was passed. The projections in the aforementioned petition was entirely different than the one given in the instant ejectment petition, therefore, the principle of estoppel or res judicata would be attracted. This contention would not require any detailed consideration as it is well settled that the plea of res judicata has to be substantiated by placing on record the

respective pleadings of the parties in the previous proceedings. In that regard reliance may be placed on para Nos. 13 and 14 the judgment of Hon'ble the Supreme Court in the case of V. Rajeshwari (supra) and the same reads as under:-

> *" 13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780] the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810: (1964) 7 SCR 831] placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.*
>
> *14. That apart, the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the*

> *plea of res judicata may proceed on an assumption that his opponent had waived the plea by his failure to raise the same. Reference may be had to Pritam Kaur v. State of Pepsu [AIR 1963 Punj 9 : 64 Punj LR 782 (FB)] and Rajani Kumar Mitra v. Ajmaddin Bhuiya [AIR 1929 Cal 163 : 48 Cal LJ 577] and we find ourselves in agreement with the view taken therein on this point. The Privy Council decision in Sha Shivraj gopalji v. Edappakath Ayissa Bi [AIR 1949 PC 302 : (1949) 2 MLJ 493] appears to have taken a different view but that is not so. The plea of res judicata was raised in the trial court; however, it was not pressed but it was sought to be reiterated at the stage of second appeal. Their Lordships held that being a pure plea in law it was available to the appellant for being raised. Their Lordships were also of the opinion that in the facts of that case, apart from the principle of res judicata, it was unfair to renew the same plaint in fresh proceedings. The Privy Council decision is distinguishable."*

In the present case apart from the order of withdrawal nothing has been placed on record. Moreover, the Rent Controller had framed a specific issue on the question of res judicata as to whether the ejectment petition was maintainable, being Issue No. 4. On the aforementioned issue as well as Issue No. 5 no arguments were addressed, as is evident from para 11 of the judgment of Rent Controller and the same view has been taken by the learned Appellate Authority. Therefore, the question of res judicata and estoppel cannot be permitted to be raised for the first time before this Court. It may also be pertinent to mention that the landlord-respondent cannot be considered to have waived off or acquiesced in the material alteration of the rented premises merely because he has accepted rent after such alterations. For the aforementioned proposition reliance may be placed on the judgments of this Court in the cases of **M/s. D.N. Metal Industries v. Chaman Lal, 2003 (1) Rent Control Reporter 551**

and **Shiv Ram (Dead) through L.Rs. v. Sham Lal and another, 2003 (2) RCR 285**. I have also not been able to persuade myself to accept the contention made by the learned counsel that ejectment petition of the landlord-respondent was mala fide. There is nothing on record to assist the aforementioned contention raised by the learned counsel nor any such argument has been raised in both the Courts below.

For the reasons aforementioned, this petition fails and the same is dismissed.

(M.M. KUMAR)
JUDGE

September 5, 2006

Pkapoor

FIT FOR INDEXING